LIBRARY
SUPREME COURT U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF, PETITIONER,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for certiorari Filed July 14, 1952

Certiorari granted November 10, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 444

STANLEY J. ORLOFF, PETITIONER,

vs.

COLONEL REX E. WILLOUGHBY, COMMANDANT OF FORT LAWTON, SEATTLE, WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

RECORD FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

	Original	Print
Petition for writ of habeas corpus	1	1
Order to show cause	5	3
Return to order to show cause	6	4
Affidavit of Rex E. Willoughby	7	5
Answer to petition for writ of habeas corpus	12	7
Traverse to return and answer	16	10
Findings of fact and conclusions of law	22	14
Judgment	27	17
Transcript of proceedings	1	17
Colloquy between court and counsel	2	18
Testimony of Stanley J. Orloff	41	32
Testimony of Allan A. Craig	50	37
Colloquy between court and counsel	54	39
Ruling of court	60	42
Proceedings in the United States Court of Appeals for the Ninth Circuit	66	44
Opinion, Orr, J.	66	44
Concurring opinion, Goodman, J.	71	48
Judgment	73	49
Order denying petition for rehearing	74	49
Clerk's certificate (Omitted in printing)	75	50
Stipulation as to record	76	50
Order allowing certiorari and leave to proceed in forma pauperis	78	51

1 IN UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

No. 2951

United States of America, on the Relation of
STANLEY J. ORLOFF, *Petitioner*

v.

REX E. WILLOUGHBY, and C. P. LINES, *Respondents*

Petition for Writ of Habeas Corpus

TO THE HONORABLE THE JUDGE OF THE U. S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION:

The petition of Stanley J. Orloff, by and through his attorneys, the undersigned, respectfully shows as follows:

1.

Petitioner is now held in custody and in restraint of his liberty by color of the authority of the United States, and he is presently detained by the United States Army at Fort Lawton, in Seattle, King County, Washington, within the Western District of Washington, Northern Division.

2.

Petitioner is so held in restraint pursuant to a purported induction into the United States authority assertedly under the authority of Public Law 779, 81st Congress (titled 48 USCA, Section 454 (1) (i)), and has so been held in restraint and so detained since July 26, 1951.

2 3.

The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, in that petitioner is in custody under and by color of the authority of the United States, and he is in custody contrary to law.

4.

Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein; and respondent C. P. Lines is a Captain in the United States Army, and the commanding officer of the

Casual Enlisted Section, Fort Lawton Personnel Center, Seattle, Washington, and is the person exercising direct and immediate custody over, and control of, petitioner.

5.

Petitioner is a medical doctor, duly and regularly admitted to the practice of medicine in New York State, and having actually engaged in the practice of medicine as a doctor for the New York Department of Mental Hygiene, for the past four years, as a psychiatrist; and at the time of his induction above stated, was a Senior Psychiatrist. Petitioner is a graduate of the Tulane University School of Medicine. Petitioner is 27 years of age, having been born April 5, 1924, and is married and has a wife and two children dependent upon him.

6.

Petitioner is not now and has not at any time since the date of his induction into the United States Army above
3 stated been subject to any part of the Selective Service Law of the United States, title 50 App. U. S. C. 454 (a), excepting only Section 454 (i), (1), providing for the induction of medical doctors and others for service as medical doctors and other urgently needed specialists, and said provision of law permits and authorizes the induction of medical doctors for service in the United States Army only as medical doctors.

7.

The regulations and practice of the United States Army provide that an individual can serve as a doctor of medicine in the United States Army only if he holds a rank as a commissioned officer.

8.

Petitioner is detained in the United States Army as a private, and is not engaged in service as a medical doctor. Prior to his induction in the United States Army, petitioner applied for a commission in the United States Army as a medical doctor. Following his induction into the United States Army, he again applied for a commission as a medical doctor, and such commission has not been issued to petitioner, and he continues to be held and detained in the United States Army as a private, contrary to the provisions of law above referred to. He has been informed by the respondents, through their subordinates, that he will not be permitted to serve as a doctor of medicine unless he first receives an appointment as a commissioned officer.

9.

Although petitioner has been in the United States Army from July 26, 1951, to the present, at no time during this period has he been employed or permitted to work as a doctor of medicine. He has requested an opportunity to work as a doctor of medicine with or without a commission, but this request has been denied.

10.

The petitioner has requested of the respondents that, in view of their refusal to permit him to serve as a doctor in the armed forces, the sole purpose for which he was drafted, they discharged him from the Army. This has also been denied.

11.

By reason of the matters and things above set forth, petitioner unlawfully restrained of his liberty and held in custody is subject to immediate shipment to the Far Eastern Command; and unless respondents are immediately restrained and enjoined therefrom, petitioner will be removed from the jurisdiction of this Court and delivered beyond the seas; and such action is immediately threatened and will take place, except as for the intervention of this Court within the next few days.

WHEREFORE PETITIONER PRAYS:

That this Court proceed in a summary way to determine the facts in this case and the legality of the present detention of petitioner as a private in the United States Army under the custody and control of respondents herein; and that upon summary determination of such facts, that respondents Rex E. Willoughby and C. P. Lines, or such other person or persons as may be detaining petitioner, forthwith do relieve petitioner from such unlawful detention; and that, to that end, the Court issue its writ of habeas corpus, directing such persons forthwith to bring the body of Stanley J. Orloff before this Court, and thereupon to release him from unlawful detention and restraint of his liberties; or, in the alternative, to show cause, if any there be, why said petitioner should not be released and restored to his liberty.

IN UNITED STATES DISTRICT COURT

Order to Show Cause—Dec. 31, 1951

This matter having come on before the undersigned Judge of the above entitled Court, in open court, on the petition of Stanley

Director of the Creedmoor Institute for Psychobiologic Studies, because of the importance of the research project in which I was then engaged.

3.

Upon my induction into the Army of the United States and until I received by PMOS, I had both requested, and expected to be assigned for work as a doctor. While I was waiting for
19 medical specialty assignment, I made specific request of Col. Warren Diessner and Col. Rawley Chambers, Brooke Army Medical Center, Fort Sam Houston, Texas, to be given work as a doctor, regardless of my grade or rank. These requests were referred by Col. Diessner and Col. Chambers to Maj. General Noyes, Commanding General of Brooke Army Hospital, Fort Sam Houston, Texas. The requests were denied.

Upon receiving my potential military occupational specialty classification (PMOS) as medical laboratory technician, which is not a doctor's work, and requires no more than a four months' training of a layman in the medical field service school, I realized that I was not to be assigned to a medical specialist category. I thereupon immediately sought administrative relief and remedy within Army channels as follows:

(a) I immediately consulted the legal assistance officer, Military Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, and inquired concerning application for administrative relief of the assistant legal officer on duty, Cpl. Milton Venier. He referred me to the Army regulation which I now know was AR 615-365, par. 3 *d*, as amended, reading as follows:

> "To dispose of cases involving an individual claiming that prior to induction he was denied a procedural right as provided by the Universal Military Training and Service Act, as amended, and he was therefore erroneously inducted.
>
> "All requests for discharge under this provision will be forwarded to the officer having discharge authority and by him to the Director of the Selective Service System, Washington
> 20 25, D. C., for his recommendation. The officer having discharge authority will discharge the individual or retain him in the service in accordance with the recommendations made by the Director of the Selective Service System."
>
> "6th Army memorandum No. 181, par. 4, August 10, 1951, replacing or amending AR 615-365, par. *d*, dated August 10, 1951."

This assistant legal officer advised me that in his opinion the question or right involved in my case was not procedural but in-

volved a substantial question of law, and that he could find no appropriate administrative channels by which it could be considered. He further suggested that since I was about to be given leave, prior to transfer to Fort Lawton, Seattle, Washington, that I take the matter up with the Inspector General in Washington, D. C., during my leave.

(b) Prior to leaving Fort Sam Houston, I made similar inquiry of Capt. Albert T. Wellner, Assistant Adjutant, Medical Service Corps. I asked him how I might be able to resolve the situation in which I found myself through Army administrative channels. He advised me to call upon the Surgeon General of the Army, while passing through Washington, D. C., during my leave.

(c) Upon arriving in Washington, D. C., during my leave, early in December, 1951, I called upon Brig. Gen. Fay Prickett, acting for, or as, the Inspector General. He referred me to Lt. Col. Beaudry, whose given name I do not remember. Lt. Col. Beaudry advised me that the problem could be resolved only in
21 the Surgeon General's office, and referred me to that office.

(d) I went to the office of the Surgeon General and was referred to Lt. Col. Jones, whose initials I believe to be J. A. He supervised the processing of my application for commission. At the conclusion of the processing of my application for commission, he advised me that it might take from six months to a year before the commission could be finally acted upon.

(e) I thereupon personally went to the office of the Judge Advocate General to appeal further, and was referred in his office to Lt. Col. Phillips. I consulted with Lt. Col. Phillips, who later called in Lt. Col. Jones of the Surgeon General's office, and they considered my case together with me. Upon learning that it might take a year before my application could be finally passed upon, it was requested on my behalf by my attorneys, David Rein, Esq., and Stanley Faulkner, Esq., that I be discharged from the Army pending final action on my application for commission, and until it was determined whether my commission would be granted or denied. My attorneys and I were advised that there was no possibility of this being done.

4.

Upon learning that no further administrative relief through Army channels was available to me, I directed my attorneys to bring habeas corpus proceedings in my behalf in Washington, D. C. The petition for writ, filed on my behalf, was denied
22 by the Court, without prejudice, upon the ground that I

was not detained in Washington, D. C., and that, therefore, jurisdiction for habeas corpus did not exist.

5.

I have been at all times, and am now, willing to serve in the Army of the United States as a medical specialist, that is, as a medical doctor. I have offered my services as a doctor in the grade or rank of private, as hereinabove set forth, but have been advised, as admitted in the answer filed herein, that I can serve in such capacity only upon being commissioned.

/s/ STANLEY J. ORLOFF

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law—Jan. 10, 1952

This matter came before the Court, sitting without a jury, upon the Amended Petition of Stanley J. Orloff for a Writ of Habeas Corpus, an Order to show cause directed to the respondents, Rex E. Willoughby and C. P. Lines, petitioner appearing in person and being represented by his attorneys John Caughlan and Siegfried Hesse, respondent Rex E. Willoughby being represented by J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and Major Robert O. Hillis,—respondent C. P. Lines having been dismissed—and each party
23 having introduced evidence and submitted briefs, and the Court having taken said matter under advisement and having heretofore rendered its oral opinion in the matter, now makes and enters its

FINDINGS OF FACT

I.

The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, in that petitioner is in custody under and by color of the authority of the United States, and is a soldier in the Army of the United States, under the command of the respondent Rex E. Willoughby, Commanding Officer, Fort Lawton, Washington.

II.

Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein.

III.

Petitioner is a medical doctor, duly and regularly admitted to the practice of medicine in New York State, and having actually engaged in the practice of medicine as a doctor for the New York Department of Mental Hygiene, for the past four years, as a psychiatrist; and at the time of his induction into the Army of the United States hereinafter mentioned, was a Senior Psychiatrist. Petitioner is a graduate of the Tulane University School of Medicine. Petitioner is 27 years of age, having been born April 5, 1924, and is married and has a wife and two children dependent upon him.

24

IV.

That petitioner was inducted for service in the Armed Forces of the United States, to-wit: the Army of the United States, as a soldier in the grade of private at New York City, July 26, 1951 pursuant to Public Law 779, 81st Congress, 2nd Session, and at all times since has been and now is a private in the Army of the United States presently assigned to and a member of Enlisted Replacement Center, Fort Lawton, Washington for shipment to the Far East Command of the Army of the United States, pursuant to par. 32 Special Orders No. 242, Headquarters Medical Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas, dated November 30, 1951.

V.

The court further finds that at the time of registration or induction pursuant to Public Law 779, 81st Congress, 2nd Session, petitioner was not a member of a reserve component of the Armed Forces of the United States and had not theretofore, since
25 August 14, 1945, had active service in the Armed Forces of the United States.

VI.

The court further finds that petitioner made application on December 10, 1951, for appointment as an officer in the Army Medical Corps Reserve, which application is still pending.

VII.

The court further finds, and the parties have stipulated in open court, that petitioner did not make application for discharge to the respondent Rex E. Willoughby at any time prior to December 29, 1951 when the petition for writ of habeas corpus was filed herein.

Conclusions of Law

From the foregoing findings of fact the court concludes as a matter of law:

I.

That this court has jurisdiction of the subject matter of the case and of petitioner and the respondent Rex E. Willoughby, Commanding Officer, Fort Lawton, Washington.

II.

That petitioner was regularly and lawfully inducted for service in the Armed Forces of the United States under the
26 provisions of Public Law 779, 81st Congress, 2nd Session, and is now lawfully a soldier in the grade of private in the Army of the United States.

III.

That petitioner is now lawfully a soldier in the Armed Forces of the United States in the grade of private in the Army of the United States and assigned to the Enlisted Replacement Center, Fort Lawton, Washington, under the command of respondent Rex E. Willoughby, Colonel, United States Army, and as such is subject to all lawful military orders and directives of the Armed Forces of the United States, including respondent Rex E. Willoughby as Commanding Officer of Fort Lawton, Washington.

IV.

That petitioner is not unlawfully in custody or unlawfully restrained of his liberty or unlawfully detained by the respondent Rex E. Willoughby.

V.

That the petitioner is not entitled to the writ of habeas corpus, and respondent is entitled to the judgment of this court denying the writ of habeas corpus and an order to discharge the rule to show cause.

Done in Open Court This 10th Day of January, 1952.

William J. Lindberg
United States District Judge

27 IN UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2957

United States of America on the Relation of
STANLEY J. ORLOFF, *Petitioner*

v.

REX E. WILLOUGHBY, and C. P. LINES, *Respondents*

Judgment—Jan. 10, 1952

This matter came before the Court, sitting without a jury, upon the Amended Petition of Stanley J. Orloff for a Writ of Habeas Corpus, an Order to show cause directed to the respondent Rex. E. Willoughby, petitioner appearing in person and being represented by his attorneys John Caughlan and Siegfried Hesse, respondent Rex E. Willoughby being represented by J. Charles Dennis, United States Attorney, John E. Belcher, Assistant United States Attorney, and Major Robert O. Hillis, Judge Advocate General's Corps, Litigation Officer for the Army in this case, and respondent C. P. Lines having been dismissed, and each party having introduced evidence and submitted briefs, and the Court having considered the same and having heretofore rendered its oral opinion in the matter, and having made and entered its Findings of Fact and Conclusions of Law in writing, Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the application for
a Writ of Habeas Corpus herein be and the same is hereby
28 denied, and the Order to show cause heretofore issued herein be and the same is hereby discharged, to all of which petitioner excepts and exceptions are allowed.

DONE IN OPEN COURT THIS 10TH DAY OF JANUARY, 1952.

WILLIAM J. LINDBERG
United States District Judge

---

1 IN UNITED STATES DISTRICT COURT

Number 2957.

(Title omitted)

* * * * * * * * * * * *

Transcript of Proceedings

had in hearing on Order to Show Cause in the above-entitled and numbered matter; commencing at 10:00 o'clock a. m. on the 9th

day of January, 1952, at United States Court House, Seattle, Washington, before The Honorable WILLIAM J. LINDBERG, United States District Judge.

* * * * * * * * * * * *

2 **Colloquy Between Court and Counsel**

The Court: Before proceeding, this matter being on an order to show cause and a petition for writ of habeas corpus, would like to ascertain, first, if there is any dispute as to the facts.

Mr. Caughlan: Could I be heard on that a moment, your Honor? In the Answer filed to Petitioner's application for writ of habeas corpus, which we received yesterday, it is alleged as a third affirmative defense that on page three (3) of that Answer, as follows:

> That Petitioner has failed to exhaust his administrative remedies provided for by paragraph 3 (d) of Army Regulations 615-365, dated the 14th of June, 1951, promulgated by the Department of the Army.

We have prepared, mainly with respect thereto, a Traverse to that portion of the Answer and Return which sets forth in detail the steps taken by the Respondent (Petitioner) in the exhaustion of such administrative remedies as he might have ascertain

3 under this or any other regulations of the Army.

Now, I don't know whether the Respondents desire to insist upon that affirmative defense as a factual matter, but, if they do, we certainly desire to establish that administrative remedies have been exhausted.

Other than that, I think there is substantially no dispute as to the facts.

We have, as I say, prepared this Traverse, which is being typed and should be here any moment, which sets forth, first, that the Petitioner was advised of the very regulation referred to by the Army; upon inquiry was further advised, by the Legal Office at Fort Sam Houston, that the regulation referred to referred to procedural rather than substantive right and was not applicable to him, and, secondly, he was advised that his rights should be taken up with the Inspector General of the Army; and was further advised by the Legal Office, and by the Adjutant's Office at Fort Sam Houston that his problem should be taken up with the Surgeon General.

Following those recommendations, he appealed to the Inspector General of the Army, when he was on leave just prior to coming to Seattle, and that appeal was considered and he was referred to the Surgeon General's Office by the Inspector General's Office, and they further considered the appeal, and that in connection there-

with he applied for a discharge by reason of the fact that he was advised he could not serve as a doctor, and that such discharge was refused him.

Now, those matters that I have just stated are, in substance, in issue in this case.

4 If the Respondents make any issue of them, in view of their question as to the administrative remedies, and their denial of paragraph number ten (10) of our Petition—as to which I would like to make oral amendment in accordance with the statement I am going to make in a moment—those matters are in issue, and we think should be, either by agreement, or by testimony, or by the affidavit and traverse that I have referred to, be disposed of in this case, because we feel that the matter is of considerable importance that this issue must be disposed of.

Now, with reference to paragraph ten (10) of our Petition—

The Court: Before we proceed on that: Major Hillis, are you to handle the argument in this matter?

Major Hillis: I will handle part of it. I don't know what part Mr. Belcher will assign to me, but I will handle part of it.

The Court: On this particular issue, the third affirmative defense, as shown in your Return, or Answer, to the Writ; are you contending as set forth in that defense?

Major Hillis: Yes, sir. Insofar as any issue of fact in our behalf, I believe that Mr. Caughlan and myself will have no difficulty in agreement upon the single issue of fact that would be material to—

The Court: This hearing?

Major Hillis: Yes, sir, this hearing.

5 The Court: Perhaps we might proceed then with the thought that, as to that issue, it may be before we proceed we can stipulate.

Mr. Belcher: There is a further matter, if your Honor please, and that is the allegation in the Petition that the Petitioner is not being utilized—that his services are not being utilized—in the category in which he was inducted.

The Court: Does that relate to the third affirmative defense?

Mr. Belcher: Yes; and we, of course, would want to offer evidence on that phase.

The fact is that the Petitioner is now in transit to the Eastern Command under military orders.

Naturally, he is not performing any services while he is in transit; but we will want to show by one of the officers, by Colonel Craig, for instance, and Colonel Willoughby, facts relating to doctors who are under draft.

We don't want to admit that he is not eventually going to be assigned.

He is in transit at the present time under Army orders to the Eastern Command, wherever that may be. It may be in Japan. It may be elsewhere.

He admits, I think, in his Complaint that he has made an application for a commission. That commission is under investigation.

I submit, if your Honor please, that under those circum-
6 stances, the action is premature.

The Court: Well, the sole question that the Court has in mind is this:

That under the third affirmative defense, and where there is a dispute on the facts, if the Petitioner has failed to exhaust his administrative remedies, it may serve to deprive the Court of jurisdiction.

Mr. Belcher: That is the point I am getting at.

The Court: If that issue for the time being may be set aside and we proceed on the other issues, it may be unnecessary to—

Major Hillis: I don't know any reason why we can't.

The Court: So that we will proceed, setting that issue aside for the time being.

Mr. Caughlan: Yes, but although, let it be understood, and I take it your Honor is not indicating any predisposition on this matter, but let it be understood, and it might be on behalf of either side, that we desire, and I am sure all parties desire, that the record in this case—I think that the matter is of importance to the Army as well as the Petitioner—I think that all parties desire that the record be complete on the question, any question of, importance to the ultimate decision in this case.

So that we would not have any objection to proceeding at this time without taking that up, but we do feel, and I am sure Re-
spondents would feel, that the record should be complete
7 on that before any final disposition of the matter, because of its importance to the case.

We would be inclined to agree, generally, that if there are proper administrative channels which can be pursued and the person has failed to exhaust those channels, that he should exhaust them before coming into Court.

We are prepared to show he has exhausted them, and we would be prepared to show that, on behalf of Respondent, or Petitioner, that he has exhausted them.

That would be our only feeling on handling other matters prior to that.

Mr. Belcher: We will desire to introduce certified copies of this man's Service Record, and all steps leading up to his induction; his application for commission, and so on.

J. Orloff, for a writ of habeas corpus, and the Court having considered said petition, and being advised in the premises, Now Therefore,

IT IS HEREBY ORDERED that Rex. E. Willoughby and C. P. Lines, commanding officers of Fort Lawton, and of the Casual Enlisted Section, Fort Lawton Personnel Center, respectively, of Seattle, Washington, or such other person or persons as may be temporarily acting in the capacity of commanding officer of Fort Lawton, or commanding officer of the Casual Enlisted Section,
6 Fort Lawton Personnel Center, be, and they are hereby, ordered to appear before the undersigned Judge of the above entitled Court at his court room in the United States Court House in the city of Seattle, King County, Washington, at the hour of 10 A. M., on Wednesday, the 9th day of January, 1952; and then and there to deliver the body of Stanley J. Orloff, before the Court; and to show cause, if any cause there be, why the prayer of Stanley J. Orloff for a writ of habeas corpus, directing that he be forthwith released from the custody of said Rex E. Willoughby and C. P. Lines or other persons temporarily acting in the capacity of commanding officer of Fort Lawton, or of commanding officer of the Casual Enlisted Section of Fort Lawton Personnel Center, of Seattle, Washington, should not be granted.

DONE IN OPEN COURT THIS 31ST DAY OF DECEMBER, 1951.

/s/ WILLIAM J. LINDBERG
District Judge

IN UNITED STATES DISTRICT COURT

Return to Order to Show Cause

Come now the respondents above named and for return to the order to show cause herein as to why a writ of habeas corpus should not issue discharging petitioner Stanley J. Orloff from the
7 Army of the United States because he has not been granted a commission as a medical officer in the Army of the United States and respectfully shows:

I.

That the said Stanley J. Orloff is an inductee in the Armed Forces of the United States for the period of twenty-one months, under the provisions of Public Law 779, 81st Congress, 2nd Session, and the Selective Service Act of 1948 as amended, and is under the exclusive jurisdiction of the Army of the United States as a soldier in the grade of private presently serving under the command of respondent Rex E. Willoughby.

These medical men are inducted as privates in the beginning and they are tendered a commission. They make an application for a commission, as the Petitioner in this case did.

There is no allegation in this Petition that that commission has been denied him. The Answer shows that the commission, the application for the commission, is still under consideration.

As I take it, the only thing that the Petitioner complains of here is that he has not been granted a commission.

Mr. Caughlan: Could we clear this up immediately?

There are certain things we want to be sure are understood; and, while we are talking about that, there is no insistance
8 in this case, there is no question involved in this case, so far as the Petitioner is concerned, as to the Army's granting him a commissionor not granting him a commission.

That is not involved.

We are not even suggesting that this Court could or should grant to Dr. Orloff a commission as an officer.

The sole and main position that is taken here by the Petitioner, which we think is the primary issue and which we believe the Respondents will agree is the primary issue, is this:

That in view of the fact that this is plainly discriminatory legislation—I don't know at this point whether it is legal or constitutional or unconstitutional, but, in view of the fact that it is plainly discriminatory legislation—the singling out of doctors as a class and permitting their induction into the Armed Services, is the failure of the Army, as alleged and admitted—which I want to discuss in just a moment—to utilize the services of Dr. Orloff as a doctor unlawfully so as to entitle him at this time to a discharge until they are prepared to use his services as a doctor.

Now, that is the only issue that is involved here.

We are not asking anybody to give anybody else a commission. I want to clear that up.

The Court: All right; let us proceed now to determine whether there are any questions of dispute, and, if so, whether it is necessary to have any further showing either by way of testimony or affidavit.

9 The Court is going to take the Petition and the Answer and determine what issues are in dispute.

Mr. Caughlan: If it will be helpful to the Court, I have taken the Petition and underlined every portion of it that is admitted and bracketed every portion of it that is denied.

I don't know whether Mr. Belcher has done the same thing, but it will take a very short time to outline what is admitted and denied in the Petition, in view of the fact, of course, that the Answer and Return referred to numbers, and so on

Whatever procedure your Honor feels is desirable.

II.

That this court is without jurisdiction of the subject matter of the petition.

III.

That petitioner heretofore filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia which was denied and from which denial petitioner is presently prosecuting an appeal to the United States Court of Appeals for the District of Columbia.

WHEREFORE respondents pray that the order to show cause heretofore issued herein be discharged.

Affidavit of Rex E. Willoughby

REX E. WILLOUGHBY, being first duly sworn, on oath, deposes and says that he is a Colonel in the United States Army and
8 presently the Commanding Officer of Fort Lawton, in King County, State of Washington.

That Stanley J. Orloff, a private in the Army of the United States is under his command at Fort Lawton, King County, Washington by authority of the United States as a member of the Army of the United States lawfully inducted on July 26, 1951, for twenty-one months of service in the Armed Forces of the United States under the provisions of Public Law 779, 81st Congress, 2nd Session, approved September 11, 1950 (50 USCA Appendix 454 (i) (1)) under the following circumstances:

That the said Stanley J. Orloff is a male person born April 5, 1924, and on July 26, 1951 he was 26 years 3 months and 20 days of age who previously was enrolled in and received professional, technical, and specialized training as a doctor of medicine in the medical school of the Tulane University of Louisiana between July 16, 1943 and August 14, 1945 under the Army Specialized Training Program. Petitioner was honorably discharged from the above service in the Army on August 14, 1945 and otherwise did not thereafter perform active military duty until July 26, 1951.

That the said Stanley J. Orloff was on and prior to July 26, 1951 a medical doctor, duly and regularly admitted to the practice of medicine in the State of New York and for an unknown period of time before July 26, 1951, was a Senior Psychiatrist at the Creedmoor State Hospital in the State of New York.

That the said Stanley J. Orloff was not on July 26, 1951, a member of a reserve component of the Armed Forces.

9 That on July 26, 1951, at New York City, State of New York, the petitioner Stanley J. Orloff was inducted in the Armed Forces for twenty-one months of service in the Army of the

United States in the grade of private pursuant to and in accordance with the provisions of the Public Law 779, 81st Congress, 2nd Session, and the Selective Service Act 1948, as amended, and thereupon was assigned to New York City RMS, Recruiting Detachment No. 2, 1202d Area Service Unit, Headquarters First Army, Governors Island, New York. On the same date the petitioner was relieved from such above assignment and transferred in the grade of private to the 1277th Area Service Unit, Reception Center, Camp Kilmer, New Jersey, for processing and subsequent assignment.

Thereafter on August 4, 1951, petitioner was relieved from assignment at Camp Kilmer, New Jersey, and transferred under competent military orders to the Medical Replacement Training Center, Brooke Army Medical Center at Fort Sam Houston, Texas, for basic military training as medical personnel inducted in the Armed Forces of the United States under the provisions of Public Law 779, 81st Congress, 2nd Session. After receiving sixteen weeks of Army Medical Service training at the above Replacement Training Center, the petitioner was awarded a potential military occupation specialty as a Medical Laboratory Technician and was ordered on November 30, 1951, by competent military authority to proceed on December 2, 1951, to the Fort Lawton Personnel Center, Seattle, Washington, reporting not later than December 10 19, 1951, which reporting date was later extended to December 29, 1951, for shipment to the Far East Command as part of a December 1951 shipment.

On December 10, 1951, petitioner applied for appointment as an officer in the Army Medical Corps Reserve and such application is now pending and under consideration but has not been finally acted upon.

On December 13, 1951, petitioner filed his petition for a writ of habeas corpus in the United States District Court for the District of Columbia and named as respondents Robert A. Lovett, Secretary of Defense; Frank Pace, Jr., Secretary of the Army; General J. Lawton Collins, Chief of Staff, United States Army; Major General William E. Bergin, Adjutant General, United States Army, and; Major General G. E. Armstrong, Surgeon-General, United States Army. Affiant is informed and states upon information and belief that the foregoing petition was heard by a District Judge in the United States District Court for the District of Columbia on December 17, 1951, and was dismissed, whereupon the petitioner noted an appeal which is now pending and undecided in the United States Court of Appeals for the District of Columbia but such appeal is docketed for hearing on January 25, 1952. Petitioner thereupon reported to the Enlisted Replacement Center, Fort Lawton, Seattle, Washington, on December 29, 1951, and is now as-

signed to and present for duty with that organization which is one of the units located at Fort Lawton, Washington under the command of the affiant.

Affiant further deposes and states that Respondent C. P. Lnes is a Captain in the Army of the United States but he is not
11 the Commanding Officer of the Casual Enlisted Section, Fort Lawton Personnel Center, Seattle, Washington; or the person exercising direct and immediate custody over and control of petitioner as alleged by petitioner in paragraph four (4) of the petition herein.

Affiant denies that the provisions of Public Law 779, 81st Congress, 2nd Session (50 USCA Appendix 454 (i) (1)) permit and authorize the induction of medical doctors for service in the Armed Forces only as medical doctors. Instead and in lieu thereof, such Public Law, the Selective Service Act of 1948 as amended (50 USCA Appendix 451-471), the Proclamations, Executive Order, rules and regulations issued and promulgated pursuant thereto by the President of the United States, permit, authorize, and make petitioner liable for induction for not to exceed twenty-one months of service in the Armed Forces in the same manner, to the same extent, and under similar circumstances as other persons liable for training and service under the provisions of the Selective Service Act of 1948 as amended.

That as a soldier in the grade of private in the Army of the United States, assigned to a unit under the command of affiant, the petitioner is a person subject to military jurisdiction and liable to further competent military orders and service, including shipment to the Far East Command in compliance with pertinent and applicable directives and regulations of the Department of the
12 Army issued by direction of the President of the United States of America, as Commander in Chief of the Armed Forces.

For the reasons hereinbefore set forth the respondent herein respectfully prays the court to discharge the order to show cause herein and dismiss the petition for the said writ of habeas corpus.

/s/ REX E. WILLOUGHBY
Rex E. Willoughby

IN UNITED STATES DISTRICT COURT

Answer to Petition for Writ of Habeas Corpus

Come now the respondents above named and for answer to the petition for a writ of habeas corpus herein, admit, deny and allege:

Mr. Caughlan: Yes.
Mr. Belcher: Yes.
The Court: That is admitted?
Mr. Caughlan: Yes.
Mr. Belcher: Yes.
The Court: Paragraph eight (8):
Mr. Caughlan: I think that is admitted in its entirety, except as to the conclusion of law, namely, the custody contrary to the provisions of law.
As we read it, everything else is admitted in that paragraph.
Mr. Belcher: Yes; that is correct.
The Court: Is that correct, except as to legal conclusions?
Mr. Belcher: Yes.
The Court: Paragraph nine (9):

14 "Although petitioner has been in the United States Army from July 26, 1951, to the present, at no time during this period has he been employed or permitted to work as a doctor of medicine. He has requested an opportunity to work as a doctor of medicine with or without a commission, but this request has been denied."

Mr. Caughlan: We understand that the first sentence of that paragraph—
The Court: Is admitted?
Mr. Caughlan: Is admitted; and that, as to the second sentence, it is—
The Court: Is it material?
Mr. Caughlan: It is simply lack of knowledge. I don't know whether it is material. They say they have no knowledge and we say that he has made such request, and we are prepared to establish it.
The Court: Mr. Belcher, can that be admitted for what it is worth?
Mr. Belcher: For what it is worth; yes.
The Court: Major Hillis, are you in agreement?
Major Hillis: Yes.
The Court: Paragraph ten (10) is denied.
Mr. Caughlan: Now, may it please the Court, with respect to paragraph ten (10), we would admit that paragraph ten
15 (10) is, as presently pleaded, inadvertently incorrect.
The paragraph ten (10) reads:

"The petitioner has requested of the respondents that, in view of their refusal . . ."

By "respondents", at the present time we mean Colonel Willoughby.

I.

Answering paragraph I respondents admit that petitioner is presently a soldier in the grade of private in the Army of the United States and stationed at Fort Lawton, Washington, pursuant to his induction under Public Law 779, 81st Congress (48 USCA, Section 454 (i) (1)) and is under the command of respondent Rex E. Willoughby, Commanding Officer, pursuant to the laws of the United States, but deny each and every other allegation, matter and thing in said paragraph contained.

13 II.

Answering paragraph II, respondents admit the same.

III.

Answering paragraph III, respondents deny the same, especially the alleged jurisdiction of this court to control or otherwise determine matters pertaining to matters strictly military, exclusive jurisdiction covering which is by Congress vested in the President of the United States as Commander in Chief, and especially do respondents deny that petitioner is in custody contrary to law.

IV.

Answering paragraph IV, respondents admit that Rex E. Willoughby is a Colonel in the United States Army and commanding officer of Fort Lawton, Washington, and the person exercising general authority over the fort and over the person of the petitioner, but deny the balance.

V.

Answering paragraph V, respondents admit the same.

VI.

Answering paragraph VI, respondents admit that petitioner is subject to Public Law 779, 81st Congress, 2nd Session (50 USCA Appendix 454 (i) (1)) providing for the induction of medical doctors but deny each and every other allegation, matter and thing therein contained.

VII.

Answering paragraphs VII and VIII, respondents admit
14 petitioner's grade in the Army of the United States is that of private and he is not engaged in service as a medical doc-

There has been no such request ever given to Colonel Willoughby and we ask leave, in order that the pleadings may present the issues in this case, to amend at this time paragraph ten (10) to read:

"Petitioner has requested the appropriate authorities and officers of the Army of the United States that, in view of their refusal . . ."

instead of Respondent, Colonel Willoughby.

The reason for that is, this was an inadvertent mistake. We were thinking of Respondent as being the United States Army, whereas, of course, Colonel Willoughby has not had such request made specifically to him.

Mr. Belcher: I think we would be entitled to know whether that request was made verbally, or in writing, and, if in writing, we would demand production of a copy of the writing.

Mr. Caughlan: We would like to ask leave at this time—

16 The Court: Isn't the question here whether or not he has made a request to be relieved, and that is the sole question?

Mr. Caughlan: That might involve the question that was referred to earlier in connection with paragraph four (4) of the third affirmative defense as to exhaustion of administrative remedies, and I would like to ask leave at this time to serve and file the Traverse with respect to that which sets forth, also, the details as to the requests for discharge, in order that the Respondent be advised of what facts are to be determined and to what extent they would admit and to what extent they would expect testimony concerning that administrative matter, which was included, or intended to be included, in paragraph ten (10).

We admit that that is inappropriately alleged.

The Court: We will tentatively defer the filing, Mr. Caughlan, until we get to that.

Mr. Caughlan: Very well.

The Court: Then ten (10) will stand denied as of now.

Paragraph eleven (11):

Mr. Caughlan: We understand that the affidavit of Colonel Willoughby, and the Return, substantially admit that paragraph, although it is formally denied.

Mr. Belcher: It is a legal conclusion.

Mr. Caughlan: As to the legal conclusion. I was referring to the unlawful restraint, but, as to the Respondent (Petitioner) being subject to the Far Eastern Command, and his

17 imminent removal from the jurisdiction, and that such action will take place except for the intervention of the Court, the affidavit of Colonel Willoughby, which is a part of the Return, sets forth virtually the—

tor, and admit the balance, save and except that petitioner is held as a private contrary to law.

VIII.

Answering paragraph IX, respondents admit the same except that they have no knowledge as to whether petitioner has requested an opportunity to work as a doctor of medicine with or without a commission.

IX.

Answering paragraph X, respondents deny the same.

X.

Answering paragraph XI, respondents deny the same except they admit petitioner is subject to further military orders.

FOR FURTHER ANSWER AND AS A FIRST AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE AND SHOW:

I.

That respondent Rex E. Willoughby is a duly commissioner Colonel in the United States Army and commander of the troops and all personnel assigned to his command at Fort Lawton, Washington.

II.

That petitioner was assigned to the command of respondent Rex E. Willoughby by the military authorities at Medical Replacement Training Center, Brooke Army Medical Center, Fort Sam Houston, Texas on November 30, 1951, effective December 29, 1951, for shipment to Far East Command.

15 AND FOR A SECOND AFFIRMATIVE DEFENSE, RESPONDENTS ALLEGE:

I.

That this court is without jurisdiction of the subject matter of the petition and that exclusive jurisdiction of both the subject matter and of the person of petitioner is by law vested exclusively in the President of the United States as Commander in Chief of the Armed Forces of the United States.

II.

That habeas corpus does not lie for the purpose for which the petition herein was filed.

III.

That in the event the court determines it has jurisdiction, then respondents pray for summary judgment under Rule 56 (*b*) United States Rules of Civil Procedure.

FOR A THIRD AFFIRMATIVE DEFENSE, RESPONDENTS SHOW TO THE COURT:

I.

That petitioner has failed to exhaust his administrative remedy provided for by paragraph 3 *d* Army Regulations 615-365 dated 14 June 1951 promulgated by Department of the Army.

FOR A FOURTH AFFIRMATIVE DEFENSE, RESPONDENTS SHOW TO THE COURT:

I.

That on December 10, 1951, petitioner under the provisions of law filed his application for appointment in the
16 Officer's Reserve Corps, Army of the United States, which application is presently being processed by military authorities because of particular statements made by petitioner in his application concerning prior membership or association with certain organizations designated by the Attorney General of the United States on October 30, 1950 pursuant to Executive Order 9835.

WHEREFORE respondents pray that the petition for the writ of habeas corpus be denied, and the rule to show cause be discharged.

IN UNITED STATES DISTRICT COURT

Traverse to Return and Answer of Respondent, Consisting of Affidavit of Petitioner, Stanley J. Orloff

STANLEY J. ORLOFF, being first duly sworn, upon his oath deposes and says:

I am the petitioner above named and I make this affidavit in support of my petition for a writ of habeas corpus, and by way of traverse to the return of respondent, as follows:

1.

During 1942 I applied for and received a commission as a second lieutenant in the Medical Administrative Corps, Reserves, Army of the United States, which commission I held until 1943, when I resigned it to enlist in the Army of the United States. Imme-
17 diately upon my enlistment I was assigned to the Army Spe-

cialized Training Program, as a medical student. Since that time I have applied for a commission in the Armed Forces three times. First, in 1945, in order to serve in the Army Medical Corps, upon completing my ASTP training. I was rejected for physical reasons and requested a waiver in order to obtain the commission despite my physical disability, and this request was also rejected. Thereafter, I was honorably discharged and continued in medical school as a civilian. Second, in May, 1951, prior to receipt of any induction notice, I applied for and was, in June, 1951, granted a commission as Captain, Medical Corps, U. S. Air Force, Reserve. Shortly thereafter, I was discharged from the U. S. Air Force, Reserve. Third, following my induction, namely, December 10, 1951, I again applied for a commission in the Medical Corps of the Army of the United States. I have not received any commission pursuant to this application, as will hereafter be more fully set forth. In addition to these applications I also made a special trip to Washington, D. C., from my home in New York, for the express purpose of applying for a commission in the United States Naval Reserve, and upon personal inquiry to the procurement officer, was advised that no application for commission in the Navy would be received because I was in priority classification I of the Selective Service System.

2.

At the time of my induction, I had completed four years of psychiatric training towards a diplomat of the National Board of Psychiatry. For more than a year prior to induction, I was assigned as a Senior Psychiatrist in the Creedmoor Institute for Psychobiologic Studies, New York State Department of Mental Hygiene, engaged in research work involving the etiology and treatment of mental disorders. The work of this institute in which I participated, devoting my full time to research work, received international recognition, the U. S. Army, among other organizations, expressed interest in our work.

In the period from 1950 to 1951, I did on two occasions scientific papers to statewide scientific conferences reporting on original work in the development of a rapid, objective, psychiatric diagnostic test. I also organized the first group therapy program for the treatment of psychotic patients at the Creedmoor State Hospital. I served on the faculty of the School of Nursing of Creedmoor State Hospital for three years as an instructor in psychiatry and neurology. I was also psychiatrist to the LaFargue Clinic in New York City for two years.

Immediately following my receipt of a 1-A Classification from the Selective Service System, my deferment was requested by the

The Court: I think the Court will proceed by reading here and, as we proceed paragraph by paragraph, we may ascertain what is agreed and what may be in dispute.

Now, as to paragraph one (1):

"Petitioner is now held in custody and in restraint of his liberty by color of the authority of the United States and he is presently detained by the United States Army at Fort Lawton, Washington . . ."

That is admitted, substantially, is it not?

Mr. Caughlan: We took it that that was admitted, except as to legal conclusions, if we can put it that way.

Major Hillis: That is probably as good a way as any to put it. It raises a legal conclusion, our conception of the language.

10 The Court: Insofar as it is properly pleaded, or alleged—

Major Hillis: Yes, sir.

The Court: —other than stated as a conclusion, it is admitted?

Major Hillis: Yes.

The Court: Paragraph two (2):

"Petitioner is so held in restraint pursuant to a purported induction into the United States authority . . ."

Mr. Caughlan: "Army", it should be.

The Court: ". . . assertedly under the authority of Public Law 779, 81st Congress (titled 48 USCA, Section 454 (1) (i)), and has so been held in restraint and so detained since July 26, 1951."

That is admitted.

Paragraph three (3):

"The jurisdiction of this Court arises under Section 2241, Title 28, United States Code, . . ."

That is a matter of law, is it not?

Mr. Caughlan: Yes.

Major Hillis: Yes.

11 Mr. Caughlan: Solely. That is in reference to the habeas corpus statute.

The Court: And then, paragraph four (4):

"Respondent Rex E. Willoughby is a Colonel of the United States Army, and is the commanding officer of Fort Lawton, and the person exercising general authority over said fort and over the person of petitioner herein; . . ."

That is admitted.

Now, the remaining portion as to C. P. Lines, that is denied. Is that conceded, Mr. Caughlan?

Mr. Caughlan: I am sorry, my attention wandered for a moment.

(Whereupon, there was discussion had between Counsel and Petitioner.)

Mr. Caughlan: Oh, yes. We do not feel that C. P. Lines, or any other person, simply as a company commander, is a material party.

It is admitted that Colonel Willoughby is the commanding officer at Fort Lawton and exercises general authority, and we, therefore, ask leave of the Court to amend the Petition by striking, in line four (4), "and respondent", to the end of paragraph four (4), so that it will simply refer to Respondent, Rex E. Willoughby, and further amend by dismissing the Petition as to Respondent, C. P. Lines.

Mr. Belcher: No objection to that.

12 The Court: Any objection?

Major Hillis: No objection.

The Court: The motion of dismissal as to C. P. Lines will be granted; and, further, the striking of the paragraph as mentioned by Counsel.

That leaves no question as to that.

Paragraph five (5):

"Petitioner is a medical doctor . . ."

That whole paragraph is admitted; is that correct?

Mr. Caughlan: We so understand it, your Honor.

Mr. Belcher: Yes.

The Court: Paragraph six (6):

Mr. Belcher: We admit it.

The Court: "Petitioner is not now and has not at any times since the date of his induction into the United States Army above stated been subject to any part of the Selective Service Law of the United States, title 50 A-p-p (spelling) U. S. C. . . ."

Mr. Caughlan: That should be "50 U. S. C. A." It is the act of June 19, 1950, as amended by the amendment to the Selective Service Act, now called Universal Military Training Service Act, and is 454 (a) through (j) in Code, Section 454, and Section one (1) to six (6) of the Act.

I think it may be stipulated that the Respondent (Peti-

13 tioner) is not subject to induction except pursuant to Section 454 (i) of the Act, namely the doctor's draft act.

Mr. Belcher: That may be stipulated.

The Court: Is that agreed?

Mr. Belcher: Yes.

The Court: Paragraph seven (7):

Mr. Caughlan: That is admitted in the Answer.

Mr. Belcher: Seven (7) and eight (8).

The Court: The fact?

Mr. Caughlan: The fact.

The Court: Insofar as this paragraph is concerned, Mr. Caughlan, isn't the admission on that sufficient?

In other words, they admit that the Petitioner is subject to further military orders. Isn't that all that it is necessary to admit?

Mr. Caughlan: I think it is. The affidavit of Colonel Willoughby reads:

> "... the petitioner is a person subject to military jurisdiction and liable to further competent military orders and service including shipment to the Far East Command in compliance with pertinent and applicable directives and regulations of the Department of the Army issued by direction of the President of the United States of America, as Commander in Chief of the Armed Forces."

We don't think that any more than that needs to be admitted, and there is no issue of fact or anything else.

18 The Court: All right. Then we will pass to the first affirmative defense.

That is admitted, I assume?

Mr. Caughlan: We admit that Colonel Willoughby is a Colonel, and we allege that, and that Petitioner was assigned to his command from the Brooke Army Medical Center.

The Court: Second affirmative defense. Of course, that is a matter of law.

Mr. Caughlan: That is a matter of law, your Honor.

The third—

The Court: The third is the one in issue now, and you are filing at this time—

Mr. Caughlan: Yes, your Honor. We ask leave at this time to file a Traverse to that by way of affidavit of Dr. Orloff.

The Court: It may be filed.

Mr. Caughlan: And we serve a copy on the Respondent. (Handing copy to Mr. Belcher.)

Mr. Belcher: No objection.

The Court: It may be filed.

Mr. Caughlan: Now, just for the convenience of the Court and the parties, I would like to state that the matters relating specifically to that affirmative defense and this traverse is included, commencing paragraph three (3), page three (3), from there to the end of page five (5), setting forth in detail the administrative relief sought through Army channels

19

The other matters are simply general matters concerning application for commission, and his history in the United States Army.

The Court: That answers the third affirmative defense.

As to the fourth affirmative defense—referring again to the third affirmative defense, your position is that Petitioner has exhausted his administrative remedy; is that correct?

Mr. Caughlan: Yes, your Honor. That is our position.

With regard to the fourth affirmative defense, we have covered the question as a matter of law in our memorandum, in our Traverse, and, in connection with the same matter of exhaustion of administrative remedy, we have set forth, on page five (5), subparagraph (d), if I may call your Honor's attention to what this is:

> "I went to the office of the Surgeon General and was referred to Lt. Col. Jones, whose initials I believe to be J. A. He supervised the processing of my application for commission. At the conclusion of the processing . . ."

The Court: May I ask where you are reading from, Mr. Caughlan?

Mr. Caughlan: Page five (5), of our Traverse, paragraph sub (d).

> ". . . At the conclusion of the processing of my application for commission, he advised me that it might take from six months to a year before the commission could be finally acted upon."

And the next paragraph, which also refers to his appeal to the Office of the Judge Advocate General, his further consultation with Colonel Jones and Lt. Colonel Phillips, in which he sets forth his request for discharge.

We mention that because of this suggestion that is made in this affirmative defense, that he filed under the provisions of law his application for appointment, and the suggestion—although not the statement—that a commission might be issued tomorrow, or something like that.

That is not the fact and so far as that is suggested in that fourth affirmative defense, it is denied.

Otherwise, it is true that he has filed his application.

It is also our legal contention that, under the provisions of this law, it is the duty of the Army to tender him a commission at the earliest possible time immediately upon his induction.

The Court: Well, now, you have had an opportunity to read the pertinent parts. Now do you see any need to introduce any testimony?

Mr. Caughlan: I will have to make inquiry on that.
21 Except as to the matter of request for discharge, and exhaustion of administrative remedies, I think we see no need for the introduction of any testimony.

Mr. Belcher: I think Major Hillis can present that at this time, if your Honor please.

Major Hillis: It probably would be well, if your Honor please, to clarify that issue, and the Government's position on it, in order to determine whether we are all talking about the same thing.

We are talking, in our Answer, about an Army Regulation.

That Army Regulation—and I assume Mr. Caughlan has a copy of it; if you do not, I have a copy for you—

Mr. Caughlan: I have no copy. We transcribed what Major Safko read over the telephone to us yesterday. It appears on page four (4) of this affidavit. You might check to see whether we have it.

Major Hillis: I am referring to Army Regulation 615-365, covering subject of discharging enlisted personnel from the Army for convenience of the Government, and therein is set forth a number of categories of persons who may request discharge, and, particularly, our position in this regard, we feel, falls under paragraph 3 (d).

That paragraph reads:

22 "To dispose of cases involving an individual's claim that prior to induction he was denied a procedural right as provided by the Selective Service Act of 1948 and was, therefore, erroneously inducted.

"All requests for discharge under this provision will be forwarded to the officer exercising discharge authority and by him to the State director of the selective service system of the State of the applicant's registration for his recommendation.

"The officer exercising discharge authority will discharge the individual . . ."

It reads:

". . will discharge the individual." " . . or retain him in the service in accordance with the recommendation made by the State director of the Selective Service System."

Now, it is our position with respect to this pending case and our Answer, that at no time prior to the filing of the application, or the petition for a writ of habeas corpus against Colonel Willoughby, did this Petitioner request Colonel Willoughby,
23 who is, by this regulation, the discharging authority about which this regulation is speaking, and that at no time was he ever presented with such a request, or accorded the oppor-

tunity of processing that request in compliance with this regulation.

Now then, as to that, if the Petitioner will admit that, then for my position there is no controversy and we could proceed under this affirmative Answer.

If it may be admitted that at no time prior to the filing of this application, and while the Petitioner has been under the jurisdiction of this Court, has he filed a request for a discharge pursuant to paragraph 3 (d), then that is the only fact that I would like to develop otherwise by testimony.

That is, briefly stated, what our position is in that regard.

The Court: I believe you admitted that that had not been done.

Mr. Caughlan: May it please the Court, that is true. There has been no request made to Colonel Willoughby. There is no question about that. He has not been requested for discharge.

The facts relating to that is that prior to his being assigned to this command he has requested Major—made the request of his—he had made the request of a discharge, or processed his request through Army channels right up to the Inspector General, Judge Advocate General and the Surgeon General, and had personally and particularly filed his requests in those offices and com-
24 pletely exhausted all administrative remedies.

There is no question that, having done that, with due respect to Colonel Willoughby, he went back to the field command, because such procedure was not even necessary.

It is our position, however, that if this is the subsisting order—and I might advise Major Hillis that Major Safko said it was rescinded August 10, 1951, and that a slightly different regulation, that he read to me, was issued, although I just have his knowledge of that—he was reading from an authenticated copy of the Secretary of the Army that they sent on 2 January—the matter is immaterial—but, I do think that there is no question of application being made to Colonel Willoughby.

We do contend, however, that there is no question in this case of a denial of a procedural right prior to induction, which is the only thing that this refers to.

This regulation reads:

". . . cases involving an individual claiming that prior to induction he was denied a procedural right . . ."

The Court: You are not contending that?

Mr. Caughlan: ". . . as provided by the Universal Military Training and Service Act . . ."

We are not claiming that at all. We don't see how it could have any application in this case, or have anything to do
25 with exhausting his administrative remedy.

Major Hillis: Mr. Caughlan was then speaking about a legal question.

I understood we were limiting ourselves to trying to determine what the fact was.

Mr. Caughlan: As I say, it is the fact, which we admit, that the Petitioner has not requested Colonel Willoughby for discharge.

Mr. Belcher: Then on that admission I move—

The Court: I don't think there is testimony on that issue. Are you in agreement?

Major Hillis: I think if that is true we are all right.

Mr. Belcher: I think on that admission of Counsel we are entitled to dismissal of this application.

The Court: You can make the motion. The Court at this time, I don't think, would be disposed to act on your motion. You can make it.

Major Hillis: If the Court please, as I understand the rule, and I am not an expert on habeas corpus:

Unless the Court deems that it wants evidence, that the matters alleged in the Petition for Writ and in the Answer, evidentiary matters, can be accepted as true.

Am I correct in that?

I am addressing myself particularly to the affidavit of Colonel Willoughby. We feel that that affidavit fully sets forth in-
26 formation which is pertinent to the Government's position.

The Court: It becomes admitted except insofar as it is denied by the Traverse.

Major Hillis: And I am particularly interested that, if the facts about which we are talking do not extend to a showing of the prior service of this individual as a member of the Army Specialized Training Program, in 1943, '4 and '5, and the fact that he does not hold a Reserve commission, those are facts which we must establish—which the Government must establish. If they are admitted, why, then that presents a different matter.

The Court: Are those facts in the pleadings?

Major Hillis: They are included in the affidavit of Colonel Willoughby attached to the Return.

Mr. Caughlan: They are set forth, I might say, in detail.

Also, and I am sure there is no dispute about this and if Major Hillis desires to examine it they are set forth in detail in paragraph one (1), commencing on page one (1), line twenty-four (24) and twenty-five (25) of our Traverse.

So that it is clearly set forth that this man, Dr. Orloff, did have training under the Army Specialized Training Program, and that he did not at the time of his induction hold a Reserve commission, he having theretofore applied for one, a commission of captaincy having been issued to him and he thereafter having been dis-

charged from the commission a few days before his induction.

27 Major Hillis: I believe this has been helpful and time-saving, your Honor. I think we are approaching a meeting of the minds on the facts, the complete facts, in this case in a manner that will put them beyond dispute.

The Court: That is what the Court is concerned about. Have you examined that?

Major Hillis: Not fully.

The Court: I suggest we take about fifteen (15) minute recess and you can examine that and, upon return, we may be able to stipulate.

Mr. Caughlan: I think that would be very wise, your Honor.

The Court: And, likewise, if you find it advisable to introduce some regulations, you can determine what regulations shall be entered or introduced as exhibits; any regulations that are not now a matter of record.

Mr. Belcher: In addition to that I think we will want to introduce the certified record showing the Petitioner's application for a commission which contains certain statements that require, under the Government's loyalty program, some intensive investigation before a commission can be granted.

The Court: We will take this recess and you may determine that, and possibly Mr. Caughlan would have no objection, and then we will proceed and we may save time.

Mr. Caughlan: Yes, sir; I think that is wise.

28 The Court: We will take a fifteen (15) minute recess.

(Whereupon, at 10:45 o'Clock, a. m., a recess was had until 11:20 o'Clock, a. m., January 9, 1952, at which time, Counsel heretofore noted being present, the following proceedings were had, to-wit):

The Court: You may proceed.

Mr. Caughlan: May it please the Court, I believe the parties have reached substantial agreement as to all the pertinent facts in this case, and Major Hillis, or Mr. Belcher, will correct me if I mention anything that is not correct.

We understand that the Respondent desires to introduce several portions of Army Regulations; a statement as to what the potential military occupational specialty of Dr. Orloff's is; what he is presently assigned to.

They desire to introduce his Army history, or Army record, including previous commissions held by him; his course in the Army Specialized Training Program; his applications for commission prior to induction and after induction.

I also understand, and we have more or less agreed, that the documents so introduced substantially confirm and document the affidavit, or Traverse, if we can put it that way, that was filed this morning, so that that was likewise accepted for what it was worth.

Leaving the only issue of fact—

One more point and with regard to the exhaustion of ad-
29 ministrative remedy, it is, we understand, substantially agreed that the things and matters that are set forth in the affidavit were done, and we understand, we have stipulated also, that no application in writing under paragraph 615-365, if that is—

Major Hillis: Paragraph 3 (d).

Mr. Caughlan: Paragraph 3 (d) has ever been made to any person in the Army and, in particular, that no application in writing for discharge has been made to Colonel Willoughby under that provision.

Those facts, those matters, I believe, are agreed and stipulated to by and between the parties, which will eliminate a very substantial part of any factual matters in dispute.

Mr. Belcher: That is correct, your Honor.

Mr. Caughlan: Is that correct?

Major Hillis: That is correct.

Mr. Caughlan: That leaves, your Honor, one matter that both parties feel would require a certain amount of oral testimony.

That is: What is the significance in terms of training and utilization of a doctor's skill in the potential military occupational specialty to which Dr. Orloff is now assigned?

It was suggested, and thought by both parties to be proper, that Dr. Orloff be placed upon the stand and qualified as an expert to state his views with respect to that, and, we understand, that Colonel Craig—who is the Post Surgeon, is that correct?

30 Major Hillis: Post Surgeon at Fort Lawton.

Mr. Caughlan: Post Surgeon at Fort Lawton—may also desire to supplement, or testify differently, or otherwise testify concerning that.

That is, in substance, the only real issue in dispute here.

All other facts are substantially agreed to as is stated, as the Court is advised, in this statement on our part.

Mr. Belcher: That is agreed to, your Honor.

* * * * * * * * * * * *

41 **Stanley J. Orloff**, the Petitioner, called as a witness for and on behalf of the Petitioner, upon being first duly sworn, testified as follows:

Direct Examination, by Mr. Caughlan.

Q. Will you state your name, please?

A. Stanley J. Orloff.

Q. What is your occupation?

A. Well, I was a psychiatrist prior—

Q. What is your present occupation?

A. Well, the present potential military occupational specialty is medical laboratory technician.

Q. Are you a private in the Army?

A. Yes, I am.

Q. Stationed at what place?

A. Stationed at Fort Lawton, Seattle, Washington.

Q. Dr. Orloff, will you state, please, what you are? You are a doctor of medicine?

A. That is correct.

Q. A graduate of what medical school?

A. Tulane University School of Medicine.

Q. Following your graduation from medical school, did you have internship residency?

A. Yes, I did.

42 Q. Where?

A. Well, I interned at Greenpoint Hospital, which is part of the New York City hospital system, and took residency at Creedmoor State Hospital, New York City.

Q. Following your degree, were you admitted to practice medicine in any State or States?

A. Yes. In Louisiana and in New York State.

Q. And did you actually practice medicine in either of those States?

A. Yes; in New York State.

Q. For how long?

A. For a period of four (4) years following internship.

Q. Will you state whether you had any specialty in your practice of medicine?

A. Yes. My full time, following internship, was devoted to psychiatry.

Q. At what institution was that?

A. Creedmoor State Hospital, first place. Full time during the day at Creedmoor State Hospital and then Creedmoor Institute for Psycliobiologic Studies, which was a research institution, and the LaFargue Clinic.

Q. In all those places were you practicing psychiatry?

A. That is correct.

Q. Do you have any specialty in your field relating to biologic or other studies?

43 A. Well, I participated in a research program which was set up by the New York State Department of Mental Hygiene inquiring into the cause, and technique of treatment, of

mental disorders. That was part of the work I was associated with.

The second part was to develop screening techniques for rapid screening of psychiatric treatments, different psychiatric treatments.

And the third was treatment of psychiatries, people who become mentally ill or insane.

Q. Following your induction into the United States Army, will you state whether you were stationed at Brooke Medical Replacement Center at Fort Sam Houston, Texas, for a time?

A. I was placed at the Station Medical Training Center at Brooke Army Medical Center, Fort Sam Houston.

Q. In connection with that did you have occasion to determine the qualifications, or requirements, in the Army for persons qualified potentially in their military occupational specialty as laboratory technicians?

A. As medical laboratory technicians? Yes, to this extent. I know it does not require a physician's background, and does not require a pre-medical background, and does not require college background, and it doesn't require an officer, but that is stated in the grades in which one can practice this specialty—military occupational specialty.

Q. Do you know what is required with reference to period
44 of time of training upon completion of basic training by an ordinary enlisted man in order to be assigned the potential military occupational specialty of medical laboratory technician?

A. To the best of my knowledge anyone who completes basic training may be assigned to a course in the school at Brooke Army Medical Center and, in a course of three (3) or four (4) months, no longer, be trained to do this work without any previous medical background.

Q. I hand to you what has been marked and received in evidence as Respondent's Exhibit Number 4. I will ask you to examine that, please. Did you examine that when we were outside?

A. Yes, I did.

Q. Before we came in? Attached to the—

The Court: What is the number of that exhibit?

Mr. Caughlan: Exhibit Number 4, your Honor.

By Mr. Caughlan: Q. Attached to the first two (2) pages of that, which set forth the specifications for this classification, is an extended description of the type of work done by laboratory technicians.

As a graduate of some medical school, Doctor, and some four (4) years practice, are you in a position to discuss the skills required for the performanee of that work?

A. Well, I believe I am. What it actually is, as the specialty implies, is the work of a technician, which means that these people are trained in certain technical procedures, which, again,
45 does not involve any medical experience or medical knowledge other than how to perform a given test.

In other words, they study the directions for these various tests. They may, say, pour a certain amount of fluid in this tube; heat this specimen over a flame; may study the criteria for interpretation of a particular test, whether plus one (1), plus two (2), or whether it does or does not precipitate.

In other words, the point I am trying to make is that it does not require, certainly, a doctor's work; and somebody can, without any medical experience, be trained to perform these procedures.

It is somewhat analogous to a filling of a prescription by a pharmacist, but it doesn't even require that much training.

That is to the best of my knowledge.

Q. Is it your opinion, Doctor, that it requires—Do I understand your opinion is that it does not require the skills which a doctor would have, or anywhere near those skills; is that correct?

A. That is correct.

Q. And did I understand that persons are qualified in that classification after four (4) months of training following their basic training?

A. Yes. That, I say, is to the best of my knowledge. I don't believe it is any longer. Perhaps Colonel Craig can tell us about that.

Q. Now, are your skills as a doctor utilized in the performance of work as a medical laboratory technician?

46 A. I don't believe so. It would apply to all doctors.

Q. I should say to one skilled, or anyone skilled, as a doctor utilized?

A. None, other than to be classified as a laboratory technician; really, no; and particularly with specialty training.

Mr. Caughlan: You may examine.

Before concluding with the witness, I believe that the other facts concerning his actual use in the Army are agreed to so that this is the only matter we are concerned with.

You may examine.

Cross Examination, By Major Hillis.

Q. Do you have within your professional ability the skill described in the specifications for a medical laboratory technician?

A. Within the many; yes.

Q. Well, are there any of the skills, or abilities, described in the specifications for a medical laboratory technician which you do not possess?

A. I can answer this in two (2) ways, if it please your Honor. One is that any doctor, in the course of his training, and in the course as an intern, at one time or another learns how to perform and execute these tests.

After he is out of internship he can never do it as well as somebody who is a laboratory technician who has great facility in pouring these fluids and doing these things, and, particu-
47 larly in my case with four (4) years since internship involved in psychiatry.

I would have to brush up on these procedures. I could do it, certainly, but it would take some effort to go back and do these things.

Q. Would it be a much simpler task for you to acquire—refresh your knoweldge—of these skills than it would be to train a new man?

A. I would think about the same.

Q. In other words, you believe now as a doctor of medicine it would still take you four (4) months to acquire these skills?

A. Well, I would understand perfectly the nature of these tests and the theoretical basis for them, but in terms of being able to perform rapidly these tests—perhaps Colonel Craig could bear me out—it would take some amount of time; whether two (2) or four (4) months, I don't know, but, it would take time to learn the procedure.

Q. But you don't deny that you do have the ability to perform these duties as a medical laboratory technician?

A. I do not deny it.

Q. You do have them?

A. Yes.

Q. You do have that ability?

A. I hope so.

Q. And the only reason that you have not exercised this ability in this field is the fact that you have not received a permanent assignment; is that true?

48 A. In the field as a medical laboratory technician?

Q. Yes, sir.

A. Yes, sir; I believe so.

Major Hillis: I have no further testimony.

Mr. Caughlan: Just one more question, Dr. Orloff.

Redirect Examination, By Mr. Caughlan.

Q. Are the skills which are set forth there, the techniques and tests which are discussed in the documents, those which are ordinarily performed by a practicing doctor of medicine?

A. These tests?

Q. Yes.

A. Not ordinarily, particularly with reference to the vast majority of these tests.

I saw some—for example, there are, I would say almost, well, over one hundred (100) tests mentioned here, and the ordinary doctor of medicine might, and not often, perform the urinary analysis, which is simple, and, oh, some will do their own blood counts, but I don't think, apart from those, an ordinary physician will do these tests.

Q. In the ordinary practice of medicine, Doctor, what type of person are these tests performed by?

A. They are done through commercial laboratories, or city laboratories where trained technicians do them.

Q. Is it true that the performance of this type of work re-
49 quires certain manual skills and familiarity with certain more or less mechanical procedures?

A. Yes.

Mr. Caughlan: I have no further questions.

Major Hillis: I have no further questions.

Mr. Caughlan: You may step down.

(Witness excused.)

Major Hillis: Colonel Craig, would you be sworn?

The Court: That is the extent of your testimony?

Mr. Caughlan: Yes, your Honor. We understand that everything else pertinent to the case is substantially agreed to.

Is that your understanding?

Major Hillis: That is my understanding.

50 **Allan A. Craig.** called as a witness for and on behalf of the Respondent, upon being first duly sworn, testified as follows:

Direct Examination, By Major Hillis.

Q. Will you tell the Court your name, your grade and your present organization?

A. Colonel Allan A. Craig, Medical Corps, United States Army Hospital, Fort Lawton, Washington.

Mr. Belcher: May we say, if your Honor please, Colonel Willoughby is here in response to the order to show cause.

Will you stand up, please, Colonel Willoughby?

(Whereupon, Colonel Willoughby arose and then resumed his seat.)

By Major Hillis: Q. How long have you been stationed at Fort Lawton, Colonel Craig?

A. Just approximately slightly over three (3) months, sir.

Q. And before that time what was your assignment?

A. Commanding Officer, Osaka General Hospital, Osaka, Japan.

Q. And before that were you at any time stationed at the medical training center at Fort Sam Houston?

A. Not at the Medical Replacement Training Center at
51 Fort Sam Houston, no sir.

Q. What were you?

A. Deputy Commander, Brooke General Hospital, Fort Sam Houston.

Q. Are you acquainted with the specifications for the medical specialty number 3858, medical laboratory technician?

A. Yes, sir.

Q. Will you tell the Court, in your own way, Colonel Craig, the process employed by the Army in training its medical laboratory technicians and the time required to do it?

A. In training a medical laboratory technician he first receives basic training, which is common to all soldiers, then special training in the performing of laboratory tests under supervision. The time of that training runs approximately two (2) or three (3) months, about two (2) or three (3) months, and he performs the tests at that time under supervision to see that he gets them correct and is able to use text books, or memoranda, to help refresh his memory as to the detailed performance of the test, most of which he learns in doing but some he doesn't do very often.

Q. With respect to the need of the Army for this particular specialty work, are you acquainted with the current condition, current demand, for this particular specialty?

A. I think so.

Q. And what is that demand?

A. Medical laboratory technicians are used in every hos-
52 pital in the Army, about six (6) or seven (7) in a two hundred (200) bed hospital; in a one hundred (100) bed hospital there would be, approximately, three (3). Larger hospitals, of course, would use more. They are used in all hospitals.

Q. In your experience, does the Army now have an adequate supply of trained medical laboratory technicians?

Mr. Caughlan: I think, your Honor, I would object to that unless there is some showing, beyond the present showing, as to his qualification to answer that.

The Army of the United States is a pretty large organization and I think this would require some statistical or special knowledge.

I have no particular objection to it being continued but question the value.

Major Hillis: I limit his answer to the extent of his experience.

The Court: He may answer, if he knows.

A. I couldn't say as to the over all needs of the Army. At the hospital at Fort Lawton I am authorized seven (7) and I have seven (7) laboratory technicians.

Q. And has that been true with respect to each of the other assignments that you have had?

A. Yes, generally speaking. It fluctuates up and down.

Q. Do you train every soldier, or every soldier who thinks he wants to be a medical laboratory technician, in that field; or
53 must they possess some fundamental qualification, or aptitude?

A. They don't have to possess any fundamental qualification or aptitude, although we try and train all soldier in what duty they perform, if possible, and in what they do show aptitude in. We do test them for that but it is not always true that they get their preferment.

Major Hillis: I have no further questions.

Mr. Belcher: Just a minute.

Major Hillis: Just a minute.

(Whereupon, there was a discussion between Counsel for Respondent.)

By Major Hillis: Q. Would a doctor of medicine in the Army as a private be required to go through the training for a medical laboratory technician before he would be allowed that specialty?

A. Not always. I try and give it to every laboratory technician. However, some laboratory technicians are trained in the hospital where they are working, on the job training in that type of work, and upon passing the necessary tests are allowed that medical occupational specialty.

Q. Would a doctor of medicine have the professional skills and abilities covered by this specialty?

A. Generally speaking he would. He might have to brush up on it a few weeks, but he would have them.

Major Hillis: You may cross examine.

54 Mr. Caughlan: I have no questions, your Honor.

The Court: That is all.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Belcher: That is our case.

The Court: It is now twelve (12:00) O'clock. I assume that the balance of the matter will be a question of argument.

Mr. Caughlan: I think that is true.

The Court: There appears to be no reason why Colonel Willoughby should remain or come back, unless he desires to.

Mr. Caughlan: I can see no reason.

The Court: Or Captain Lines. There is no reason for him to return. I think the matter has been dismissed as to him anyway.

Mr. Caughlan: We asked for that.

While we are thinking of that, Mr. Belcher and Major Hillis said there was no objection on their part to the amendments to the pleadings this morning.

Mr. Belcher: That is correct.

Major Hillis: That is correct.

Mr. Caughlan: That applied both to the dismissal of Captain Lines, which the Court passed on, and the amendment of paragraph ten (10).

The Court: Will you restate that for the record?

Mr. Caughlan: Yes. Just a moment.

Paragraph ten (10). It was orally moved to amend to
55 read as follows:

"The Petitioner has requested of the appropriate authorities and officers of the Army of the United States that, in view of their refusal to permit him to serve as a doctor . . ."

The words:

" . . the appropriate authorities and officers of the Army of the United States . . "

to be substituted for the words:

" . . the respondents . . "

Mr. Belcher: No objection to that, your Honor.

The Court: That amendment may show.

* * * * * * * * * * * *

57 The Court: Are we ready to proceed Mr. Caughlan?

Mr. Caughlan: Yes.

Before proceeding I wanted to clarify and I have just discussed it with Major Hillis, the state of the record as to this stipulation, and, in order that there may be no misunderstanding, may I repeat what Major Hillis and I discussed, your Honor?

The Court: You may.

Mr. Caughlan: It is stipulated, as we understand, between the parties, with respect to administrative remedies and the record of the Petitioner, that the matters of fact set forth in the affidavit of Petitioner designated as "Traverse" may be taken as true.

It is further stipulated that no written application, or application of any kind, has been taken for discharge pursuant to paragraph 315—

Major Hillis: Three (3) (d).

Mr. Caughlan: Paragraph 3 (d) of Regulations 615-365.

The Court: That is Exhiblt Number 1, Army Regulations?

Major Hillis: Yes, sir.

Mr. Caughlan: Yes, your Honor.

Then we say, to any officer or authority competent to give discharge under that regulation.

58 Now, that is, I think, our understanding of the state of the record at the present time and both parties so stipulate. Is that correct?

Major Hillis: That is my understanding, your Honor.

The Court: The record may so show.

Mr. Caughlan: And that being the case, your Honor, there is no further evidentiary matters to be offered on behalf of the Petitioner.

The Court: Now, may I inquire as to this:

The Court during the Noon Hour hurriedly reviewed the exhibits. With reference to Exhibit Number 1, a regulation referring to the application for discharge, namely section 3 (d), that refers to cases where there has been some question raised as to the procedural aspects of the induction, and that is the only part of that regulation that you state is applicable?

Major Hillis: Yes, sir.

The Court: Do I understand, Mr. Caughlan, that you contend that there was any procedural question?

Mr. Caughlan: That is correct, your Honor.

The Court: To the Petitioner's induction?

Mr. Caughlan: We make no claim that he was improperly classified, or otherwise denied any procedural relief to which he was entitled up to the time of his induction.

The Court: That narrows the issue then.

59 You contend then, Mr. Caughlan, that the applicable section, which is referred to as section 454 sub-section (a), under which this Petitioner was inducted, does not permit his retention in the Army in the capacity as a private.

Mr. Caughlan: It is our contention, your Honor, that this section, as applied in this instance to this case, does not permit his detention in the Army under the circumstances that exist as shown by the facts in this case.

That is our contention. That, as a question of law relating to the—

The Court: It now becomes a question of law.

Mr. Caughlan: Yes, sir.

The Court: And do you wish to proceed with the argument?

Mr. Caughlan: Yes. If I may have just a moment; I wanted to organize one thing here.

The Court: Now, as to argument, Mr. Caughlan will open, and you (Major Hillis) will respond, and you (Mr. Caughlan) will have a short rebuttal.

60 (Whereupon, argument was had as indicated by the Court and the following proceedings were then had, to-wit:)

Ruling of Court

The Court: I believe the Court is in a position to rule at this time.

First of all, the Court will say that he feels that the Petitioner here is clearly within his rights in coming into Court seeking a writ of habeas corpus to determine his status.

The question is one which is not free from doubt and there is no other method whereby he may determine whether or not he is legally held in the Army.

The facts in this matter have been agreed upon, and appear from the pleadings, exhibits and stipulations of Counsel.

The Court has sought by some independent research, anticipating the questions that might arise in this case, to determine the law applicable and has come to a conclusion as to the law.

The only questions that may be determined by this Court in this matter is whether the Petitioner has had due process of law in being inducted into the Army, and, whether having been lawfully inducted, he is being retained in the Army in compliance with the law.

The Court has no authority to review the action of the Army in making classification of or assigning its personnel, and no question is raised as to compliance with law or procedure by his draft board or other agencies in inducting the Petitioner into the Army.

The question appears to the Court to be clearly one as to whether a doctor, a medical doctor, may be inducted under the stat-

61 ute involved and be retained in the Army regardless of whether he is given a status as a doctor, which it appears can be given, under the stipulated facts, only when that person is a commissioned officer.

It would appear from pertinent excerpts from Congressional hearings and debates that the purpose of the law was to encourage and to bring into the Service more doctors who were seriously needed.

As far as the Court is concerned, it is clear from the nature of the questions and responses in those Congressional hearings that the law itself does not require that the person, or doctor, drafted under the Act must serve as a doctor.

The questions put by the members of the committees, and the responses thereto, indicate that the Army "intended", "proposed", or "hoped" to do certain things, but the law itself did not require that the Service do so. If the law covered the situation, there would have been no occasion for the questions.

Now, this is a rather anomalous situation where a person seeking a commission was granted a commission and then had it taken away before he was inducted. It is not for the Court to say whether such action was proper or not, and the Court must assume that the Armed Forces acted properly in that matter.

Having no commission, the Petitioner finds himself in service as an enlisted man and has been unable to secure a commission since his induction.

62 There is indication that a commission may eventually be granted the Petitioner, but it is the Court's interpretation of the law that, even should the Army deny that commission, the Court could not require, or compel, any action insofar as the Armed Forces are concerned.

Therefore, as the Court interprets the law, a doctor inducted under the statute applicable is in the service in the same status as he would be had he been inducted under other applicable statutes, and whether he is used in a medical category or not.

Respecting whether or not such interpretation would render the law unconstitutional, it is the Court's belief that it would not do so.

The classification as to doctors is a reasonable one in view of the demand in the Armed Forces for doctors and, undoubtedly, the law was passed for the purpose of securing, one way or another, greater medical personnel.

It is quite possible that it has served to operate, as indicated in the Congressional hearings, to compel doctors to seek commissions and get into the Service rather than take the chance of being drafted and possibly serving as an artilleryman, or infantryman, should he be so drafted.

So that is the ruling of the Court and the writ will be denied.

Proceedings in the United States Court of Appeals for the Ninth Circuit

66 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,248

STANLEY J. ORLOFF, *Appellant*,

vs.

REX E. WILLOUGHBY, Colonel, United States Army, *Appellee*.

Appeal from the United States District Court for the Western District of Washington, Northern Division.

Opinion—March 13, 1952

Before: ORR and POPE, Circuit Judges, and GOODMAN, District Judge.

ORR, Circuit Judge:

Appellant petitioned for a writ of habeas corpus. The petition was denied. He appeals. Appellant is a medical doctor, specializing in psychiatry. On July 26 1951 he was inducted into the armed forces as a private by authority of the so-called "Doctors Draft Law," Public Law 779, 81st Cong., 2d Sess., 1950 U. S. Code Congressional Service 3641. The statute grants the President of the United States authority to " * * * require special registration of and; on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—(A) medical and allied specialist categories who have not yet reached the age of 50 at the time of registration * * * Persons called hereunder shall be liable for induction for not to exceed twenty-one [now 24] months of service in the Armed Forces." Public Law 779, 81st Cong., 2d Sess. § 1. Thus, while under the terms of the general draft law, Selective Service Act of 1948, persons over the age of 26 are not eligible for induction, 50 U.S.C.A. App. § 454(a), as amended by Public Law 779, doctors, dentists and allied specialists, in contrast with the general population, may be inducted up to the age of 50. Appellant was over the age of 26 at the time of his induction. Prior to the date of his induction, upon advice of the Selective Service System, and to avoid being inducted under the Act,[1] appellant applied for and was granted a commission as a captain in the Medical Corps, United States Air Force. However, his commission was revoked on July 24, 1951, two days before the date of his scheduled induction, because of his failure to execute certain Air Force forms dealing with his commission application.

67

[1] The Act, § 7, exempts members of the Reserves from induction.

Appellant is presently a private in the Army of the United States, assigned to and a member of Enlisted Replacement Center, Fort Lawton, Washington, for shipment to the Far Eastern Command. Since his induction the Army has given appellant a potential military occupational specialty (PMOS) of medical laboratory technician. Appellant has repeatedly requested the Army to assign him work as a medical doctor regardless of grade or rank, but has been informed that Army regulations permit only commissioned officers to practice as doctors. On December 10, 1951 appellant reapplied for a commission and his application is now pending. Upon being informed that it would take from six months to a year before his application was finally passed upon, and the Army being unable, because of his non-commissioned status, to use him as a doctor in the interim, appellant brought his petition.[2] His initial attempt to secure release from the Army was in the District Court for the District of Columbia. The petition was there dismissed for lack of jurisdiction. Orloff v. Lovett, 101 F. Supp. 750 (D.C.D.C. 1951). Upon arrival at Fort Lawton the present
68 proceeding was instituted and the District Court ruled on the merits adversely to appellant.

The fundamental question before us is one of statutory construction. Appellant urges that a doctor inducted under the Act must be used as a doctor in the armed services, that such requirement is mandatory under the Act, and that since his induction was for the one purpose only, if the Army cannot or will not give him such work, he must be discharged. His interpretation is based on the premise that the purpose of the Act was to enable the armed services to secure needed medical, dental and allied specialists without unnecessarily depleting the short supply of such civilian persons, and that consequently to draft a doctor and use him in another capacity is directly opposed to congressional intent because (1) the civilian supply is depleted, and, (2) the military demand remains unsatisfied. To give to the statute any other construction, argues appellant, would render it unconstitutional. That the primary purpose of drafting doctors, not otherwise subject to induction, was to supply the armed forces with needed specialists in this category, is apparent. Certainly, that was the ground on which

2 There is nothing in the record to indicate that appellant's present application for a commission will be looked upon by the Armed Forces more favorably than his first such application. The Army may take a year to finally act on the application and, if so, appellant will have served almost three-fourths of his induction term before being accepted or again rejected for a commission. In the interim, according to appellant's claims, he will be forced to serve in a capacity violating the statutory command, or in pursuance of an invalid statute. Under these special circumstances we do not think that this action is prematurely brought insofar as it may be argued that appellant should await action on his application for commission.

the bill was justified to Congress by the military. And it also seems apparent that Congress contemplated that inductees under the Act would normally be utilized in their professional capacities. A reading of the debates in Congress is replete with references to such a congressional understanding and desire. See, 96 Cong. Rec. 13857, 13859. On the other hand, we have for decision the question of whether Congress enacted its understanding and desire into positive law and made such particular use of professional inductees mandatory upon the military.

The case was argued and briefed before us by appellee on the broad theory that, under the statute, doctors could be drafted and used for any purpose the Army saw fit; that the matter of duty assignment for such inductees was simply a matter of military discretion. In response, appellant urges that such a construction renders the Act subject to constitutional attack as unreasonable and discriminatory class legislation. We find it unnecessary to decide the constitutional question. The appellant is not being utilized in a capacity wholly outside the medical field. While it is true that under Army regulations he cannot practice medicine as such, he is nevertheless being employed in a type of work for which his medical training renders him peculiarly adaptable. There are many specialized duty assignments within the Armed Forces which require the performance of tasks well within the competence of doctors due to their extensive medical training. Such assignments may well be criticized as wasteful because not utilizing the inductee's capacities to the full level of his ability, but they are nevertheless within the area of his special competence. We think that a construction that the military may make such duty assignments is as far as we need go in this case. Such a construction, because of the clear relationship between the special class of inductees and the work they may be required to perform, removes the constitutional question from the case.

69

The words of the statute, in terms, do not require appellant's construction that a particular type of work alone can be assigned to inductees. Nor do they, in terms, require that a commission be granted inductees. On the contrary, it may well be urged that the words used will not bear the meaning which appellant seeks to impress upon them. The Act is written in the form of an amendment to the Selective Service Act of 1948, and seems merely, by acting within the framework of the general law, to describe additional classes of men eligible for induction under the latter statute. There is nothing to indicate that men inducted under this new section of the draft law are to be treated, after entrance into the armed forces, differently from men inducted under other provisions. It is significant that when Congress intended a class of

registrants to be used in a particular manner, as in the case of conscientious objectors, it designated the type of work to which such persons should be assigned in the Armed Forces. See 50 U.S.C.A., App. § 456(j). We do not think that the words of the statute preclude the Army's present utilization of appellant.

The legislative history of the Act bears out this construction. Congress was deeply concerned over the use that would be made by the Armed Forces of inductees, and that the military should not waste their talents. Justification for the bill as written, and the allaying of congressional fears was accomplished by assurances from the military that men inducted under the Act would be used in their professional capacities. See "Hearings before
70 House Armed Services Committee on H. R. 9554, 81st Cong., 2d Sess. 7164, 7174, 7176. These assurances were in turn used as arguments for passage of the bill during the debates. 96th Cong. Rec. 13857. The necessity for such reassurances implies a congressional recognition that as written the bill simply described a new class of persons eligible for induction, and did not make mandatory use of the inductees strictly in their professional capacities. We think Congress passed the bill in the form it did relying upon the good faith of the military's representations that professional talents of the inductees would be effectively utilized. Appellant having been given a duty assignment within what we find to be the minimal permissible area, we are without power to control the exercise of military discretion.

Problems of a nature similar to that presented by this case were discussed before Congress. Representatives of the American Medical Association and American Dental Association were concerned that men might be inducted under the Act before their applications for commissions were acted upon. Accordingly, they proposed that the bill provide for deferment of induction of men who had pending applications and, in addition, that a provision be placed in the law prohibiting induction of men who had been refused commissions by the Armed Forces. See Hearings before Subcommittee of Senate Armed Services Committee on S. 4029, 81st Cong., 2d Sess. 11, 19, 21. The representatives of the American Dental Association criticized the Senate Bill (which for our purposes may be treated as the bill that was actually passed) by saying that it did not " * * * provide a mechanism for commissioning at least the medical and dental personnel who might be inducted * * * although if such personnel are [not] commissioned it would be difficult to utilize their professional services to the maximum extent under the existing corps system." Id. at 21, and see House Hearings, supra, 7199. At another point the American Dental Association representative asserted: "It is the con-

viction of the American Dental Association that professionally trained men should be used in their professional capacities. If it is not possible for the Armed Forces so to utilize such personnel, then, * * * it is better that the professional skill of such person be made available to the civilian population." Id. at 24. A bill was introduced in the House and died in committee which
71 prohibited induction of registrants until they had been tendered a commission. See Hearings before House Committee on Armed Services, supra, 7206. It was recognized that a man could not be inducted into a commissioned status but would have to be drafted as a private. General Robinson, Surgeon General of the Army, testified before the House Committee that upon being drafted it would be Army policy to tender a commission to the inductee, but that it could be done only if he would accept it. Representative Kilday asked: "If he would not accept it he would remain on as an enlisted man?" General Robinson replied: "That is correct." Hearings before House Committee on Armed Services, supra, 7164. Congress then was not unaware of the problems that might arise in the case of men inducted, necessarily as privates, under the Act. Yet, as eventually adopted, the bill bears silent witness to the rejection of legislative proposals specifically designed to deal with such situations. It seems apparent, however, that the induction of a doctor without the tendering of a commission is and will continue to be a very exceptional case indeed. The Medical Corps of the Air Force in this case went out of its way to have appellant commissioned before induction, by postponing certain requirements in order to accomplish this. It was appellant's refusal to comply with regulations that resulted in his commission being revoked. Appellant cannot be said to be without fault in causing the situation in which he now finds himself. Nor is the Army to be censured in this particular case. It found itself with an inductee sent by the Selective Service Board, which it could not, because of regulations, use as a doctor in a full sense. We have not been advised as to how the Army could legally discharge the inductee under such circumstances. It has him on its hands and is using him in a capacity employing some of his skills. We see no more it could do.

The judgment is affirmed.

GOODMAN, District Judge, concurring:

I concur in the result, because I believe that the "Doctors Draft Law" was administered fairly by the Military and in accordance with Congressional intent, as to appellant. He was com-
72 missioned. The commission was revoked because of *his* re-

fusal to comply with regulations. This fully justified the denial of the writ by the Court below.

I do not agree with the court's view that the statute permits the military to make any duty assignment to a drafted doctor within a "minimal permissible area." It seems to me that this holding is not necessary for decision in this case. Since it has been made the basis of decision, I cannot agree to it.

In my opinion, Congress did not leave to the military the power to fix the duties of a drafted doctor within some general undefined limits. For if that be so, then a drafted doctor, for example, could be put to work by the military, cleaning sponges or instruments in an operating room, upon the theory that such work has a reasonable relationship, within a "permissible area," to medical services.

In my opinion, Congress intended that a drafted doctor should be a doctor in the military service, unless his own refusal prevents. Otherwise he should be discharged and returned to civilian medical status.

---

73 IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13248.

STANLEY J. ORLOFF, *Appellant*,

vs.

REX E. WILLOUGHBY, Colonel, United States Army, *Appellee*.

Judgment—March 13, 1952

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Western District of Washington, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

---

74 IN UNITED STATES COURT OF APPEALS

Order Denying Petition for Rehearing—April 17, 1952

Upon consideration thereof, and by direction of the Court—Goodman, District Judge dissenting—IT IS ORDERED that the petition of appellant, filed April 12, 1952, and within time allowed

therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

---

75 Clerk's Certificate to foregoing transcript omitted in printing.

---

76 IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

* * * * *

Stipulation as to Record—November 14, 1952

Subject to the approval of this Court, it is hereby stipulated and agreed by and between counsel for the respective parties that in printing the record in the above-entitled case the following portions of the record may be deleted:

1. All of that portion of Volume I following line 5 of page 28.
2. The following portions of Volume II:

a. Page 1, line 19, through page 2, line 7, inclusive.
b. Lines 8 and 9 of page 2 with the exception of "THE COURT."
c. Page 30, line 10 through page 40, inclusive.
d. Page 55, line 15 through page 57, line 2, inclusive.
e. Last three lines of page 62.
f. Page 63 through page 65, inclusive.
g. Page 75.

77 It is further stipulated that the parties may refer in their briefs and arguments to the portions of the record not printed.

DAVID REIN,
Counsel for Petitioner.

ROBERT L. STERN,
Acting Solicitor General,
Counsel for Respondent.

Dated: November 14, 1952.

78 SUPREME COURT OF THE UNITED STATES

* * * * *

Order Allowing Certiorari—November 10, 1952

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 444.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

November 10, 1952.

Petition for Writ of Certiorari Not Printed

BRIEF FOR PETITION-ER